

FILED & ENTERED

JUN 09 2022

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY fisherl DEPUTY CLERK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION**

In re:

Louie Esquivel Salazar

Case No.: 1:21-bk-11467-MT

CHAPTER 7

**MEMORANDUM OF DECISION RE
EVIDENTIARY HEARING ON DEBTOR'S
MOTION TO AVOID LIEN UNDER § 522(f)**

Debtor(s).

Evidentiary hearing held:

Date: January 27, 2022

Time: 10:00 a.m.

Courtroom: 302

On October 21, 2021, Debtor filed a Notice of Motion and Motion to Avoid Lien under 11 U.S.C. Section 522(f) (the "Motion") ECF doc. 11 and 13,¹ related to recorded liens held by Neil Sunkin ("Sunkin" or "Creditor") on real property at 11134 Cayuga Ave., Pacoima, CA 91331 (the "Property" or the "Cayuga Property"). Debtor explained that there were two recorded liens on the Property related to Sunkin's one judgment for underlying civil case number PS013986: (1)

¹ Sunkin explained that the second lien recorded May 2013 as recorder no. 20210767689 reflects his renewal of judgment, with post-judgment interest included in the amount. Where the Court refers to the "Motion," it does so as to ECF doc. 13, and the \$78,451.23 lien identified therein. To permit Debtor to proceed with the County Recorder's Office, Debtor will need two separate Orders, one for each recorded lien identified in ECF doc. 11 and 13, even though all parties acknowledge Sunkin obtained only one judgment against Debtor, the lien for which on the petition date was in the amount of \$78,451.23.

1 lien recorded on April 13, 2012, in the amount of \$39,909.00, recorder's instrument number of
2 20120560190; and (2) lien was recorded on May 13, 2021, in the amount of \$78,451.23,
3 recorder's instrument number of 20210767689. In the Motion, Debtor argued that Creditor's
4 \$78,451.23 judgment lien impairs his homestead exemption. The assertion of value of the
5 Property in the Motion was supported only by Debtor's declaration as the homeowner. Id. On
6 November 12, 2021, Creditor filed a Notice of Opposition and Request for Hearing, and a
7 hearing was set for December 8, 2021. Sunkin argued that:

- 8 (1) Debtor inflated the amount of the liens that encumbered the Property;
- 9 (2) Debtor understated the value of the Property; and
- 10 (3) Debtor did not establish residency in the Cayuga Property to be eligible for a homestead;
- 11 exemption therein because of a prior recorded homestead exemption on a piece of
- 12 property in Victorville, CA.

13 Debtor filed a Reply on November 23, 2021, ECF doc. 25. In the supporting declaration,
14 Debtor explained that he obtained a Broker's Price Opinion (the "BPO") prior to filing bankruptcy
15 in which the broker valued the Cayuga Property at \$610,350. Debtor Decl. ISO Reply, ¶ 6; Ex.
16 E.

17 At the hearing on December 8, 2022, the Court took oral argument on the Motion. The
18 parties ultimately winnowed the dispute down to two issues, Debtor's residency to establish
19 eligibility for homestead and value of the Cayuga Property. The Court continued the matter as
20 an evidentiary hearing to January 27, 2022, allowing the parties time to obtain formal appraisals
21 and file them with the Court.

22 The parties filed briefs in advance of the evidentiary hearing, on January 27, 2022, but
23 neither party filed a formal appraisal. See ECF doc. 36 and 38. After the evidentiary hearing
24 concluded, the parties filed their closing briefs, and the matter was submitted on February 7,
25 2022.

Standard

The statutory language of § 522(f) yields a four-part test for avoidance of a lien:

- (1) There must be an exemption to which the debtor “would have been entitled” under subsection (b) of § 522;
- (2) The property must be listed on the debtor's schedules and claimed as exempt;
- (3) The lien at issue must impair the claimed exemption; and
- (4) The lien must be either a judicial lien or another type of lien specified by the statute.

In re Mohring, 142 B.R. 389, 392 (Bankr.E.D.Cal.1992).

A debtor's exemption rights are determined as of the petition date. Wolfe v. Jacobson (In re Jacobson), 676 F.3d 1193, 1199 (9th Cir. 2012) (“under the so-called ‘snapshot’ rule, bankruptcy exemptions are fixed at the time of the bankruptcy petition.”); Gose v. McGranahan (In re Gose), 308 B.R. 41, 45 note 7 (B.A.P. 9th Cir. 2004). So, Debtor's exemption rights were fixed on the day they filed the bankruptcy petition, August 31, 2021 (ECF doc. no. 1).

In the instant case, the property at issue was listed on Debtor's schedules and claimed as exempt, and Sunkin's lien is a judicial lien. Thus, the second and fourth elements of this test are met. The next inquiry is whether Debtor “would have been entitled” to the exemption under § 522(b), and whether the lien at issue impairs the claimed exemption.

The first element of the test described above is that the debtor “would have been entitled” to the exemption under § 522(b). This language requires the Court to find that the debtor is entitled to the exemption under relevant state or federal law in order to authorize the avoiding of a lien under § 522(f). Under § 522(f), the court must determine whether the debtor would have been entitled to the exemption in the absence of the lien. In re Morgan, 149 B.R. 147, 153 (B.A.P. 9th Cir. 1993). This determination is made as of the date the debtor files bankruptcy. In re Herman, 120 B.R. 127, 130 (B.A.P. 9th Cir. 1990). The state of affairs considered by the court is hypothetical, not actual. Owen v. Owen, 500 U.S. 305, 311-312, (1991). Thus, the court must essentially treat the judicial lien as non-existent until the date of the bankruptcy at which time there is a hypothetical attempt to levy on the property by the trustee. See Herman, 120 B.R. at 130.

1 All property owners have an automatic exemption, which does not arise absent a forced
2 judicial sale. In re Knudsen, 80 B.R. 193, 195 (Bankr.C.D.Cal.1987). Should a forced lien sale
3 occur, a debtor will receive his statutory homestead exemption before payment of the judgment
4 lien “because a debtor's homestead exemption is senior in priority to a judgment lien.” In re
5 Wilson, 90 F.3d 347, 351 (9th Cir.1996); Cal.Civ.Proc.Code § 704.850. According to the
6 automatic homestead provisions, the property cannot be sold in a forced sale unless the
7 proceeds are used to satisfy a judgment debtor's homestead exemption before being applied to
8 satisfy a judicial lien. See In re Pike, 243 B.R. 66, 69-70 (B.A.P. 9th Cir. BAP 1999);
9 Cal.Civ.Proc.Code § 704.800(a).

10
11 Generally, a Debtor's claimed exemption is presumptively valid, and the objecting party
12 has the burden of proving that the exemption is improper. In re Diaz, 547 B.R. 336 (citing Carter
13 v. Anderson (In re Carter), 182 F.3d 1027, 1029 note 3 (9th Cir. 1999); Fed. R. Bankr. P.
14 4003(c)). However, where a state law exemption statute specifically allocates the burden of
15 proof to the debtor, as California has done here, Rule 4003(c) does not change that allocation.
16 Diaz, 547 B.R. 337. Under California Code of Civil Procedure § 703.580(b), “[a]t a hearing
17 under this section, the exemption claimant has the burden of proof.” Thus, Debtor here has the
18 burden to prove that they are entitled to the exemptions they claim.

19
20 **Dispute re residency for purposes of claiming a homestead exemption**

21 California has codified two types of homestead exemptions. The first is the automatic
22 dwelling house exemption found in Article 4 of Chapter 4 of the California Enforcement of
23 Judgments Law. CCP § 704.720(b) provides that “[i]f a homestead is sold under this division ...
24 the proceeds of sale ... are exempt in the amount of the homestead exemption provided in
25 Section 704.730.” CCP § 704.710 defines “dwelling” as a place where a person resides.

26 The second homestead exemption is the declared homestead exemption which is found
27 in Article 5 of Chapter 4 of the California Enforcement of Judgments Law. CCP § 704.920
28 provides that “[a] dwelling in which an owner or spouse of an owner resides may be selected as
a declared homestead pursuant to this article by recording a homestead declaration in the office

1 of the county recorder of the county where the dwelling is located.” “Dwelling” as used in CCP §
2 704.920 is defined in CCP § 704.910(c) as “any interest in real property that is a ‘dwelling’ as
3 defined in Section 704.710.” The declared homestead only protects a homeowner’s equity
4 against subsequently recorded judicial liens, however, which can only attach to the amount of
5 any surplus equity over the total of (1) all prior liens and encumbrances on the declared
6 homestead, and (2) the homestead exemption. Cal.Civ.Proc.Code §§ 704.950(2)(c); 704.960.
7 See In re Pike, 243 B.R. 66, 70 (B.A.P. 9th Cir. 1999).

8
9 In the case of In re Anderson, 824 F.2d 754, 757 (9th Cir. 1987), the Court of Appeals
10 held that under applicable California law, the declared homestead exemption only adds benefits
11 to the automatic homestead exemption. A debtor must first qualify for the automatic homestead
12 prior to obtaining the additional benefits of the declared homestead exemption. Id. at 758–59.
13 The Ninth Circuit explained that one of the prerequisites to qualifying for the automatic
14 homestead is the “continuous residency” requirement of CCP § 704.710(c). Id.

15 Pursuant to California law, the factors a court should consider in determining residency
16 for homestead purposes are (1) physical occupancy of the property and (2) the intention with
17 which the property is occupied. In re Bruton, 167 BR 923, 926 (Bankr. S.D. Cal. 1994). A debtor
18 temporarily absent from the property on the date of the bankruptcy petition can claim a
19 homestead exemption in that property. In re Pham, 177 BR 914, 919 (Bankr. C.D. Cal. Dec. 7,
20 1994). California courts have long held that a lack of physical occupancy does not preclude a
21 party from establishing actual residency and claiming the homestead, if the debtor intends to
22 return. Diaz v. Kosmala (In re Diaz), 547 BR 329, 335 (B.A.P. 9th Cir. 2016). Physical
23 occupancy on the petition date is therefore neither a necessary nor sufficient condition of
24 residency. Whether the debtor physically occupies the property or not, however, the debtor must
25 have an intention to reside there. Diaz, 547 BR at 336.

26
27 Lastly, the Pham court noted that the California legislature amended CCP § 704.710(c)
28 in 1983 to delete the requirement of actual residency on the date the automatic homestead (the
petition date) is made. The deletion was intended to make clear that a temporary absence from

1 the residence for e.g., vacation or hospitalization, would not destroy the characteristic of the
2 residence as the principal dwelling. Pham, 177 BR at 919.

3 Sunkin argued that Debtor presented no evidence in support of the Motion to Avoid Lien
4 that he resided at the Cayuga Property and was thus entitled to claim a homestead exemption.²
5 Debtor presented proof of declared homestead exemptions for the Cayuga Property and for
6 vacant land in the Littlerock, CA. While Sunkin attempted to cast Debtor as untruthful by the
7 existence of two recorded, claimed homestead exemptions, Debtor credibly explained that he
8 did not understand that a homestead exemption cannot be claimed on more than one property,
9 and that he did not scrutinize the language of the recorded homestead on the vacant land that
10 attested to a dwelling thereon. Debtor submitted photographs of the Littlerock property to show
11 that there is no dwelling or other structure there, demonstrating that he could not have lived
12 there on the petition date.
13

14 Sunkin also initially objected to the admission of Debtor's children's school enrollment
15 records that he provided as evidence of his residing at the Property as his homestead, attacking
16 the records authenticity during his cross-examination of Debtor. At the Evidentiary Hearing, the
17 Court had the following colloquy with Sunkin:

18 THE COURT: Mr. Sunkin, do you have any reason to believe that this is not a record of
19 the San Fernando High School? At all?

20 SUNKIN: Ah no, actually, Your Honor... so, I'm happy to stop this line of
21 questioning...

22 THE COURT: I mean, this is a classic school record, and a teacher fills it in every year,
23 with different handwriting, he picked it up from the school... I mean, we're
24 spending all this time on authenticity when there is really no question...

25 SUNKIN: May I ask another question, then, on this document?

26 Evid. Hr'g on Motion to Avoid Lien, 12:26:26 - 12:26:49 (Jan. 27, 2022).

27 The debtor's testimony about where he resided was credible. It was also supported by
28 his daughter's school records in the local area that he picked up from the school. The records

² While Sunkin appeared to have abandoned his argument and acceded to Debtor's residency at the Cayuga Property, the Court addresses it here, for completeness of the record. Evid. Hr'g on Motion to Avoid Lien, 12:53:10 - 12:53:21 (Jan. 27, 2022):

Court: I don't think there is any question he lived there.

Sunkin: Your Honor, I'm not going to waste time with... I mean, I think there is a real issue as to the value.

1 were adequately authenticated by him and their internal indicia of a routine public record under
2 Fed. R. Evid. 901((b)(1), (4) & (7)). Having considered the testimony and evidence in support,
3 the Court finds that the Cayuga Property was Debtor's residence during all relevant time periods
4 before and on the date of the Petition. Debtor is entitled to an exemption as contemplated
5 under subsection (b) of § 522.
6

7 **Dispute re value of real property at 11134 Cayuga Ave. Pacoima, CA 91331**

8 Creditor initially argued that Debtor had not met his burden of proof on value by
9 presenting only his personal declaration as to the value of the real property. Specifically,
10 Creditor attacked Debtor's use of internet appraisal websites to form his opinion. Creditor
11 rested his entire case on his argument that "while a debtor may be entitled to offer an opinion on
12 the value of his own home, it is not to be given much credibility." Sunkin Response, 4:7-8, ECF
13 doc. 38. While a lay debtor's opinion of value as homeowner may not be very persuasive when
14 weighed against a comprehensive appraisal, "[w]here there is no other competent evidence
15 offered in opposition, however, even an owner's lay opinion as to value under Fed. R. Evid. 701
16 may carry the day." See In re Cocreham, 2013 WL 4510694, *3 -*4 (E.D. Cal. Aug. 23, 2013),
17 ECF doc. 40, attach. 2.
18

19 At the evidentiary hearing held on January 27, 2022, Sunkin objected to the testimony of
20 Sammy Gomez, a real estate broker, arguing that Debtor's witness was a "surprise" and that he
21 wanted another continuance for an opportunity to depose him or conduct other discovery.
22 Gomez was called to provide a foundation for admitting the BPO that he created related to the
23 Property. Debtor offered Gomez' BPO after Sunkin objected to Debtor's declaration as the only
24 evidence in support of the Property value, arguing that Debtor's declaration was not admissible
25 or, in the alternative, was not sufficient evidence to withstand his objection. Gomez'
26 appearance and testimony was not a surprise because the witness was previously disclosed in
27 the pleadings by Debtor. Debtor's Reply to Sunkin Opposition, 3:11-22, ECF doc. 25 (Nov. 23,
28 2021); Decl. of Louie Salazar ISO, ¶ 5, ECF doc. 36 (Jan. 6, 2022). Further, at the previous
hearing held on Dec. 8, 2021, the Court discussed with the parties that a continuance was

1 needed to provide Sunkin an opportunity to obtain an appraisal to counter Debtor's BPO. The
2 Court then set deadlines for filing supplemental briefs or appraisals, based on these
3 conversations. There had been months for both sides to avoid these evidentiary issues by a
4 simple appraisal. Sunkin's objection to the debtor and BPO testimony was overruled by the
5 Court as going to the weight of the evidence and not the admissibility.

6 As Debtor noted, Sunkin had been provided more than a month's worth of time to obtain
7 an appraisal of the Property to support his position. The Court was prepared to weigh Debtor's
8 BPO against the formal appraisal obtained by Sunkin, and rule accordingly. Sunkin instead
9 chose to forgo obtaining his own evidence of value to counter Debtor's declaration, maintaining
10 his position that Debtor's proffered evidence of his declaration and testimony is insufficient to
11 meet Debtor's evidentiary burden. Sunkin's reliance on this point is misplaced – the evidence
12 that Debtor relied on at the evidentiary hearing was not merely his own lay knowledge as a
13 homeowner. Once Sunkin raised his objection to Debtor's Motion to Avoid Lien, arguing that
14 Debtor's declaration was not sufficient evidence to meet his burden, Debtor then bolstered
15 support for his Motion by submitting the BPO and testimony of Sammy Gomez, a real estate
16 agent licensed in California since 1989, with previous experience in the Pacoima area of the
17 San Fernando Valley where the home is located.

18
19 At the evidentiary hearing, Sunkin attacked Gomez' knowledge of the Property during
20 cross-examination by using what he believed about the Subject Property from his time as
21 Debtor's state court counsel in 2008-2009. Sunkin is not, however, an owner of the Property
22 and is an attorney by trade. No foundation has been offered that would permit Sunkin to
23 competently testify as to the interior details of the Property nor opine about its value. After
24 having been very dismissive of Debtor's use of online appraisal websites to form his opinion,
25 Sunkin attempted to use similar sources to impeach both Debtor's and Gomez' testimony and
26 support his own theory of the value of the Property. The exhibits consisting of internet appraisal
27 websites offered at the evidentiary hearing as evidence of value to rebut Gomez' testimony are
28 not admitted. They are generalized abstract valuations based on algorithms with no inspection
and no cross-examination or indicia of authenticity. Thus, the only evidence as to value that

1 carries any evidentiary weight, even if limited, is the BPO and testimony of Gomez. Sunkin
2 chose not to counter the BPO with a comprehensive appraisal to provide the best evidentiary
3 support to protect his lien.

4 The Court notes the expense each party must have incurred to prepare for this
5 evidentiary hearing. Such costs might have been mitigated by simply obtaining a
6 comprehensive appraisal which, if properly authenticated, would have likely been accorded
7 more weight than the BPO and Debtor's lay declaration. Having considered the testimony and
8 evidence submitted, the Court finds that the value of the Cayuga Property on the Petition Date
9 was \$693,250. This amount takes into account Gomez' opinion of value of \$610,000 from the
10 BPO, reflecting the value sometime before the petition date, and Debtor's opinion as the
11 homeowner that the Cayuga Property likely increased in value. No admissible evidence was
12 proffered to counter this finding. While internet sites may not be submitted to show value, the
13 court did take Sunkin's cross-examination of Gomez with these values into consideration. No
14 evidence was introduced that causes the court to believe the value is any different than
15 \$693,250.
16

17 Section 522(f)(2) provides a formula for calculating the extent to which a lien impairs an
18 exemption: add the lien, all other liens on the property, and the "amount of the exemption that
19 the debtor could claim if there were no liens on the property" and then subtract from that amount
20 the value of the debtor's interest in the property in the absence of any liens. See Pike, 243 B.R.
21 at 71. In this case, the calculation would be as follows:
22

Lien #1 (Select Portfolio Svc)	\$ 370,889.71
Lien#2 (Sunkin)	\$ 78,451.23
Lien#3 (Salazar, previously avoided, ECF 20)	\$ 0
Exemption Claimed	\$ 600,000.00
<u>Total of liens plus claimed exemption</u>	<u>\$ 1,049,340.94</u>
Minus FMV of property	\$ 693,250.00
Total amount of judicial liens that may be avoided	\$ 356,090.94

As the exemption is impaired by the amount of \$356,090.94, and the Sunkin lien is less than the \$356,090.94 impairment amount; the lien is avoidable in its entirety. In re Pike, 243 B.R. 66, 71 (B.A.P. 9th Cir. 1999), citing In re Hanger, 217 B.R. 592, 595 (B.A.P. 9th Cir. 1997).

Dispute re validity & amount of Salazar lien

Sunkin also argued that the lien held by Marciano and Guadalupe Salazar was either not a valid lien or was overstating the amount owed, noting that there was no admissible evidence to support the amount owed that was secured by the Salazar lien. The Salazar lien was previously avoided by motion under § 522(f) and does not figure into the impairment calculation related to Sunkin's lien. In fact, the removal of the Salazar Lien from the calculation would have inured to Sunkin's benefit by creating equity to which his lien could attach, had the exemption not been impaired even without calculating the Salazar lien.

For the reasons stated above, Debtor's Motion(s) to Avoid Lien of Judgment Creditor Sunkin (ECF doc. 11 and 13) are GRANTED. Debtor to submit Orders in accordance with this ruling within 7 days.

###

Date: June 9, 2022


Maureen A. Tighe
United States Bankruptcy Judge